United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1067

To be argued by:
R. William Stephens, Esq.
Time requested for argument:
20 minutes

B
P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1067

UNITED STATES OF AMERICA,

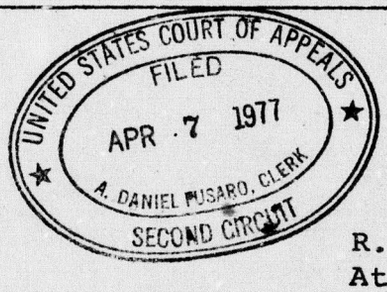
Appellee,

vs.

MAURICE BURSE,

Appellant.

BRIEF OF APPELLANT



R. WILLIAM STEPHENS
Attorney for Appellant
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

ORIGINAL

TABLE OF CONTENTS

STATEMENT OF ISSUES PRESENTED FOR REVIEW		1
STATEMENT OF THE CASE		2
FACTS		3
THE TESTIMONY OF DeBOSE		9
POINT I -	THE DOUBLE JEOPARDY CLAUSE CONTAINED IN THE FIFTH AMENDMENT BARS RETRIAL OF A DEFENDANT WHERE JEOPARDY HAS ATTACHED IN THE FIRST PROCEEDING AND THE CONVICTION IS OVERTURNED BECAUSE OF PROSECUTORIAL OVERREACHING.	
	Procedural Background	17
POINT II -	THE TESTIMONY OF ANNA DeBOSE WAS THE RESULT OF AN IMPERMISSIVELY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE AS A MATTER OF LAW AND SINCE THERE WAS NO INDEPENDENT BASIS FOR IDENTIFICATION, SUCH TESTIMONY SHOULD HAVE BEEN EXCLUDED AS PART OF THE PROSECUTION'S CASE.	26
POINT III -	THE COURT'S SUPPLEMENTAL INSTRUCTION TO THE JURY THAT THE MINORITY SHOULD RECONSIDER THEIR POSITION, PREJUDICED THE DEFENDANT.	32
CONCLUSION		40

TABLE OF CASES

Allen v. United States, 164 U.S. 492 (1896) 33, 35, 36, 37, 40
Ashe v. Swenson, 397 U.S. 436 (1970) 24
Ball v. United States, 163 U.S. 662 19, 22
Downum v. United States, 372 U.S. 100 (1963) 22
Foster v. California, 394 U.S. 440 (1969) 31
Green v. United States, 355 U.S. 184 (1957) 18, 19
Huffman v. United States, 297 F. 2d 754 (5th Cir. 1962) 39
Illinois v. Sommerville, 410 U.S. 458 (1973) 22
Ralls v. Manson, 375 F. Supp. 1271 (D.C. Conn. 1974) 37, 39
Simmons v. United States, 390 U.S. 377 (1968) 30, 31
United States v. Bailey, 468 F. 2d 652 (5th Cir. 1972) 37
United States v. Boston, 508 F. 2d 1171 (2d Cir. 1974) 31
United States v. Burse, 531 F. 2d 1151 (2d Cir. 1976) 3, 5, 17, 30
United States ex rel Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973) 31
United States v. DeStefano, 476 F. 2d 324 (7th Cir. 1973) 35
United States v. Kenner, 354 F. 2d 780 (2d Cir. 1965) 36
United States V. Kessler, 530 F. 2d 1246 (5th Cir. 1976) 18, 20-24
United States v. Jorn, 400 U.S. 470 (1971) 18, 19, 20, 21, 23, 24
United States v. Perez, 9 Wheat. 579 (1824) 18
United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974) 31

TABLE OF STATUTES

18 U.S.C. §371 2
18 U.S.C. §2113 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1067

UNITED STATES OF AMERICA,

Appellee,

vs.

MAURICE BURSE,

Appellant.

BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is this prosecution barred under the "double jeopardy" clause of the Fifth Amendment?

2. Should the identification testimony of Anna DeBose have been excluded as a matter of law because it was a result of an impermissively suggestive photographic identification procedure?

3. Was the "Allen" charge of the court to the jury which had not reported a deadlock and the advising of the jury that the "minority" only should reconsider their views, proper?

STATEMENT OF THE CASE

This is an appeal by the defendant Maurice Burse from a judgment of conviction entered on January 18, 1977 in the United States District Court for the Western District of New York (Curtin, C.J.). The judgment was entered upon a jury verdict returned on December 27, 1976, convicting the defendant-appellant of conspiring to rob a federally insured bank in violation of 18 U.S.C. §371 as charged in Count 1 of an indictment containing three counts. This was a retrial of a case which had been tried before a jury and a jury verdict had been returned on October 2, 1975 convicting the defendant of conspiring to rob a federally insured bank (18 U.S.C. §371) and acquitting the defendant of violations of 18 U.S.C. §2113(b) taking and carrying away with intent to steal and purloin the deposits of a federally insured bank as alleged in Count 2 of the indictment and acquitting the defendant of an alleged violation of 18 U.S.C. §2113(a) charging him with taking by force, violence

and intimidation from the person and presence of another money in the custody of a federally insured bank as charged in Count 3 of the indictment. On appeal from the October 2, 1975 conviction, this Court reversed the conviction on two grounds, namely, (1) the failure of the court to charge the jury on the alibi instruction as requested and (2) prosecutorial misconduct (531 F. 2d 1151 (2d Cir. 1976)).

FACTS

On July 30, 1974 the Lackawanna Branch, Ridge Road Office of the Manufacturers and Traders Trust Company was robbed (58-59*). The robbery was committed by one Darrell DeBose (157), with the aid of one Gary Green (154). Approximately one month later the Grand Jury returned an indictment charging DeBose and Burse with conspiracy and with two substantive counts of bank robbery and further charging that they were aided in the endeavor by Gary Green, who because he was a juvenile, was named an unindicted co-conspirator (Indictment Appendix B.)

It was the theory of the Government's case that this bank robbery was a three-person affair and in mustering its

---

* Numbers refer to pages of trial transcript.

proof on that subject, relied almost exclusively on the testimony of DeBose. The second trial was predictably an "instant replay" of the first. In both trials, the Government relied on DeBose's testimony, not only that the defendant Burse had conspired with him to rob this bank, but that he had actively engaged in such robbery by being in the bank with him with a shotgun, poised in such a fashion so as to be in front of one of the surveillance cameras of the bank and that the three participants had run from the bank to a nearby apartment.

Significant it is that although DeBose testified that the defendant Burse was in the bank during the commission of the robbery itself, no one of the dozen employees in the bank at the time, nor the many customers who were also there, identified the defendant Burse as being in the bank and only one witness - employee testified that there was any more than one person involved in the robbery. Of even more significance, however, is the fact that although the principal witness DeBose testified that the three persons had run together from the bank (173, 222, 223), the employee who gave chase after the robbery, testified unequivocally that there were only two (82, 83, 85, 86, 90) and a further purported identification witness stated that only two and never three (93) persons had run past her in the

vicinity of the bank (400, 408). There was no testimony by anyone of the many persons who had an opportunity to see and observe the things that transpired that day (71-72, 94-95) that there were three people involved in the bank robbery.

The Government attempted to buttress what the trial court originally characterized as a "not overwhelming"* case against the defendant by proving beyond every doubt the guilt of the two persons whom the defendant conceded were involved in the bank robbery (Opening for defendant 18). Consequently, considerable evidence was taken including the picture of DeBose robbing the bank taken from the surveillance camera (Gov't. Exhibit 7, 65-66), the introduction of sunglasses and jacket worn by him on that day (Gov't. Exhibits 5 and 6 - 166-167), the testimony of the teller that he was the person who had robbed her (65-66), and the arrest of Gary Green and the securing from his person some of the bait money (154) which was turned over to the robber at the time of the commission of the crime (Gov't. Exhibits 2, 3, 66 - 154-155).

Of the many prosecution witnesses, Thomas Langer testified only to the fact of the bank robbery and did not

---

* Evaluated by this Court on the first appeal as "less than overpowering". 531 F. 2d. 1153. (Appendix D)

connect the defendant with it in any way; Douglas Ehlert testified only to the removal of the bank surveillance film and Arthur Karn testified as to the development of a certain slide of the film showing that DeBose was indeed the culprit. The teller, Helen Jurek, testified unequivocally that DeBose had robbed her, but that she had seen no one else and significantly, had not seen the defendant Burse or anyone in the area where DeBose claimed him to be (90). Frank Desmore, who gave chase, testified that there were two participants only (82-90) and detective Joseph Schwartz of the Buffalo Police Department testified concerning his arrest of Gary Green and the fact that Green had on his possession, bait money which was taken in the robbery (157). Gary Green did not testify.

Other witnesses produced by the prosecution, included the stepmother of Darrell DeBose, who testified that on a Tuesday in the summer of 1974*, two persons came to her home, one of which she stated was identified to her by her son as Maurice or Marie (106, 113) although she had not met him before (112-113). The prosecution also called Evon Wright as a witness, who testified that the defendant was in her apartment on that day,

---

* July 30, 1974 was a Tuesday.

but also revealed that she was a close friend of the defendant's brother who was in the habit on hundreds of occasions, of sleeping in her apartment at night and who had aided DeBose in his attempts to avoid arrest by the F.B.I. on the morning of the robbery. Barbara Ramos was called by the Government to testify concerning two persons (400, 408) who ran past her immediately after the robbery, one tall and one short (400, 408*), but when flatly asked the question, stated that she was "not that sure" (424) that one of them was the defendant Burse. She stated she was sure of the taller of the two (425), the one pictured in the bank (426).**

The defense called three witnesses: two were members of his family, who testified that on the morning in question, the defendant was home raking leaves and garbage in the yard (433, 454); the third was the next door neighbor who testified that the defendant was in the yard raking after the bank was robbed (357). The defendant also introduced into evidence the film taken from the bank surveillance cameras which showed that the defendant was not standing where DeBose claimed he had been.

---

* DeBose is 6'2" (226), Green is 5'6" (Defendant's Exhibit No. 3).

** DeBose.

There was considerable testimony from many of the witnesses cumulative to the effect that the defendant Maurice Burse was one of ten children (281, 351, 431, 448), including six brothers (294, 351), many of whom were of approximately the same age and physical description (352, 431); that many persons confused the brothers from time to time (295, 431) and that the defendant's brother Kenny Burse was in the apartment of Evon Wright both before and after the bank robbery (283, 296, 298-299). There was further testimony that Evon Wright had on hundreds of occasions, entertained Kenneth Burse as a guest in her apartment overnight (281, 294, 295, 315, 414, 431, 451)* and that they were very, very friendly (282, 294, 414, 431). There was further testimony that another prosecution witness, Barbara Ramos was very friendly with both Evon Wright (452) and Kenneth Burse (413) and that on occasion, the three had cabareted together (320, 413, 452).

This testimony, together with the evidence that the proceeds of the bank robbery had been divided at the apartment immediately after the robbery (233-234), thus, enabling the bank robber DeBose to pay Evon Wright $10.00 for her lies to the F.B.I. agents concerning his presence there all evening

---

* Including the night before her testimony at the first trial (315).

and all morning (289, 301, 307), strongly suggested that Darrell DeBose, Evon Wright and Barbara Ramos were fabricating their testimony in order to protect their friend Kenneth Burse and in the case of Evon Wright, to avoid implicating herself in the conspiracy to rob the bank (309-310).

Thus, the critical question for the jury's resolution, was the believability of bank robber DeBose in his sworn assertions that the defendant Burse had conspired with him and had participated in the bank robbery. This was so, even though defendant Burse, had on a previous trial, been acquitted of the substantive bank robbery counts.

THE TESTIMONY OF DeBOSE

Darrell DeBose testified (157-181, 196-279) that on the evening of July 29, 1974 he met the defendants Maurice Burse and Gary Green at School 12 park (159) where plans were made by them to rob the bank the following day. He testified that he reluctantly agreed to participate in the robbery (161). The following morning the defendant Burse and Gary Green came to his home (163) and the three left together, went to Gary Green's aunt's house where a shotgun was obtained (163). Thereafter, they proceeded to downtown Buffalo and took a bus to Lackawanna and

that Gary Green loaned him the money for bus fare (231, 254). On reaching Lackawanna, they went to Evon Wright's house at 40 Steelawanna where they stayed a few moments and then proceeded to the bank (165). He described the clothing he wore on that day (166), but could not describe anyone else's clothing (167). He stated that he and Maurice went into the bank while Gary Green stayed outside (167-168). He marked on Government Exhibit 10 the place where Maurice Burse was standing in the bank with the shotgun according to him and this marking placed the defendant Burse directly in front of a bank surveillance camera. He stated that they then exited the bank and the three ran together to 40 Steelawanna Avenue (173). He remained at 40 Steelawanna at the apartment of Evon Wright (175). The F.B.I. agents later came to the apartment and he and Evon Wright told the F.B.I. agents that he had been there all the previous evening and that morning (228). He testified that the defendant's brother, Kenny Burse was also at the apartment earlier that morning (230, 250) and further testified that the money was not divided and distributed to him until he returned to Buffalo later that evening when Gary Green gave him $80.00 (177). Later, when interviewed by the F.B.I. agents, he told them that a man named Jimmy Barner had robbed the bank (236-242, 268-275). On a subsequent occasion, he gave a written statement to the F.B.I. agents admitting his

involvement in the robbery and stating that there were two others with him. In that statement he named Gary Green, but did not name the defendant Maurice Burse. He testified that later he advised the F.B.I. agent that there were two others who participated with him and that one of them was the defendant Burse and one was Gary Green. He testified that before leaving Evon Wright's apartment, he gave her $10.00 (197, 252, 260).

There was considerable evidence developed during the testimony of Darrell DeBose that he is a scoundrel, willing to lie to shift the blame to innocent people to avoid punishment, a person who has an extensive history of lying to law enforcement officials in order to avoid punishment, and that his testimony fails to square with the testimony of other disinterested observers and witnesses concerning the alleged involvement of the defendant Burse. Thus, it was developed that although on direct examination he had testified that the only other name by which he is known is "Spider" (157); he testified that on many occasions upon being arrested, he has given law enforcement officials false names (199), such as Darrell Washington, Darrell Jackson, Michael Jackson (199), Gerald DeBose and that on a recent occasion, he lied concerning his identity and misrepresented himself to be his father in order to cheat out of funds, his father who has

taken care of him (200-201). He freely admitted that these misrepresentations were made to avoid jail or imprisonment (201). Additionally, on occasion, he has lied to law enforcement officials concerning his age in order to fall within the lenient provisions of the New York State Youthful Offender Statute (202-203). He has even misrepresented his age to judges in order to receive more favorable treatment (203-204) and to avoid going to jail (204). It was disclosed that he has twice been convicted of third degree robbery (205) and it was demonstrated that from his many experiences, in his short lifetime, he is well acquainted with the legal distinction made in criminal statutes (205). He admitted that he is guilty of all the crimes that he was charged with in the indictment in this case (206-207), but that he was allowed to plead guilty to conspiracy only, carrying a maximum sentence of five years and the charges carrying a maximum sentence of ten years have been dismissed (206-208). He admitted that in August of 1974 he admitted to the F.B.I. agents and law enforcement officials that he was guilty of all three crimes, but after entering his plea, his sentence was postponed until December of 1975 (210). He admitted that at an interview at the Erie County Jail in December of 1974, he had stated that he "would rather be shot than go to jail for ten years" and that he would "rather be dead than go to jail

for ten years" (212-213). He stated that he had accurately marked the place where he claimed the defendant Maurice Burse was standing in the bank which is directly in front of a surveillance camera (214). He stated that he never before had been involved with the defendant Burse in any of his other criminal activities (217). He stated that he did not know where Maurice Burse lived and had never been in his home in his life (217) and although he could accurately describe the clothes he was wearing on that day, he could not at all recall what the defendant Burse was wearing on the day in question or on the evening before (217) and indeed, when questioned as to what the defendant Maurice Burse was wearing, he stated "how would I know" (217). He stated that it was he who later told his mother that the name of one of the persons who came to his home in the morning of July 30, 1974, was Maurice (220). He stated that when he was in the bank he could see Maurice Burse and could see the shotgun he claimed Maurice was carrying (221). He testified that the three of them "ran together" (222, 223). He admitted that at Evon Wright's apartment, the brother of Maurice Burse, Kenny Burse was at the apartment both before and after the bank robbery took place (230-231). He stated that Gary Green had loaned him busfare in order for him to get to

Lackawanna that morning (232), that the money from the bank robbery was not distributed to him until that evening in Buffalo when Gary Green gave him the money (177), but admitted that he paid Evon Wright $10.00 before leaving her apartment after she had helped him decieve the F.B.I. agents into thinking that he had been at the apartment the prior evening and the entire morning (228). The list of bail money included many $10.00 bills which were taken in the robbery (Gov't. Exhibits 2 and 3). He admitted that in a written statement to the F.B.I. agent signed by him, he had stated that the money was divided at Evon Wright's apartment (232-234). He admitted that he lied to the F.B.I. agents when they spoke to him in Evon Wright's apartment on the morning of July 30th, (235) and that later, on a subsequent interview, he lied when he told the F.B.I. agents that a named Jimmy Barner had robbed the bank (236); that he was willing to have Jimmy Barner prosecuted for the bank robbery in order to save himself sometime in jail (238) and that he lied about Jimmy Barner's involvement for that purpose (238). He admitted that the subject of his parole had come up prior to his testimony in this case (244) and admitted that he would rather go on the street than have his confinement continued (246); that he hoped to favorably impress the court (247) and at the time of his sentencing he had requested leniency because of his testimony (248). He

admitted that he had paid Evon Wright a $10.00 bill because she had done him a favor that morning (252). He admitted his extensive involvement in criminal activities with young black males, not the defendant Burse, on previous occasions (265) and that he was associated with one such man in the stealing from a person $2.00 worth of food stamps (267). He testified that he was associated with two other young black males when they beat up a man and stole $90.00 from him (268). He admitted that his testimony during this trial does not square with his testimony at the previous trial (274) and that on each occasion when he has been questioned about this bank robbery, his story has changed (275). Indeed, during his direct examination, when asked by the prosecutor, whether or not he had told the F.B.I. agents "essentially what you told us here today" his response was "no, not really" (181).

The above recitation of facts and testimony of the various witnesses during the trial is offered in an attempt to show that the case was a close one rather than any claim on behalf of the defendant that the evidence was legally insufficient to support the conviction. On behalf of the defendant, no claim is made that the evidence is insufficient since under a long line of federal cases, the uncorroborated

testimony of an accomplice is sufficient to support a conviction. Rather, it is claimed by the defendant that in a close case such as this one, the impermissively suggestive identification procedure referred to below and the prejudicial Allen charge requiring the minority only to reexamine their position, constituted prejudicial reversible error with respect to this defendant.

POINT I

THE DOUBLE JEOPARDY CLAUSE CONTAINED IN THE FIFTH AMENDMENT BARS RETRIAL OF A DEFENDANT WHERE JEOPARDY HAS ATTACHED IN THE FIRST PROCEEDING AND THE CONVICTION IS OVERTURNED BECAUSE OF PROSECUTORIAL OVERREACHING.

Procedural Background

The defendant was indicted on August 28, 1974 in an indictment charging him with three crimes, in three separate counts. On September 23, 1975 he was tried in the district court. On October 2, 1975 the jury returned its verdict finding the defendant not guilty with respect to Counts 2 and 3 and guilty with respect to Count 1 charging conspiracy. During this trial the government representative in summation made certain remarks which were objected to and during the course of the trial, the defendant moved for a mistrial, which motion was denied. Following conviction, the defendant appealed and the Second Circuit Court of Appeals, in an opinion reversed and remanded and held that "The government's closing argument . . . violated permissible standards of prosecutorial conduct." United States v. Burse, 531 F. 2d at 1154 (2d Cir. 1976).

After remand the defendant moved to dismiss the entire indictment* and when that motion was denied by the trial court with respect to the conspiracy count, the motion was renewed after the jury was empaneled (Tr. 8-9). After the jury verdict, the defendant moved for judgment of acquittal on the same ground (App. Index #71, Tr. 667-683).

This case presents the issue raised by the Supreme Court of the United States in United States v. Jorn, 400 U.S. 470 at 479 (1971) and which was the basis for the reversal in United States v. Kessler, 530 F. 2d 1246 (5th Cir. 1976) as to what extent prosecutorial misconduct or overreaching may bar retrial under the Fifth Amendment.

The adoption of the Bill of Rights as Amendments to the Constitution, immediately after its ratification, was a manifestation of the fear that the Federal Government would overpower the citizens. To limit the power of the Federal Government, the Amendments were adopted and the inclusion of a prohibition against placing a defendant twice in jeopardy, represents a policy of finality for the defendant's benefit in Federal Criminal proceedings. See United States v. Jorn, 400 U.S. 470 at 479 (1971). The Double Jeopardy Clause prohibition

---

* The Government did not resist dismissal of Counts 2 or 3, nor could it. United States v. Perez, 9 Wheat. 579 (1824); Green v. United States, 355 U.S. 184 (1957).

is "not against being twice punished; but against being twice put in jeopardy". Ball v. United States, 163 U.S. 662, 669 (1896). Thus, the policy underlying its adoption, is to prevent a government from subjecting an individual to repeated prosecutions for the same offense and the awareness of society of the heavy personal strain which a criminal trial represents for the individual defendant and limiting the government to a single criminal proceeding to vindicate its vital interest in enforcement of criminal laws. United States v. Jorn, 400 U.S. 470 at 479. See also Green v. United States, 355 U.S. 184, 187-188 (1957). In Green, supra, the Supreme Court noted that the policy underlying the Double Jeopardy Clause "is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . .". Because the Amendment was adopted in order to limit the government in its ability to conduct repeated trials for the same offense, it should be interpreted so as to exclude the possibility that the government has available, a method of repeatedly trying a defendant.

The defendant does not claim that a reversal by an appellate court prevents later retrial, but only claims that when the reversal is because of prosecutorial misconduct, the government is barred from retrying the defendant. This was

recognized by the Supreme Court of the United States in its opinion in United States v. Jorn, 400 U.S. 470 (1971) where the court stated:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. 12"
>
> "12 Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal reprosecution might well be barred. Cf. United States v. Tateo at 468 n 3, 12 L.Ed. 2d, at 452 n 11 supra."

In this passage, the Supreme Court recognized that the government, in a case which was going poorly, could, if the Fifth Amendment were interpreted otherwise, have a means at its diposal to insure a further trial by an inflamatory closing statement designed to avoid an acquittal and secure a conviction in the first proceeding and the ability to have a second proceeding in the event that the inflamatory summation required reversal by an appellate court.

The issue was squarely presented to the Fifth Circuit Court of Appeals in United States v. Kessler, 530 F. 2d

1246 (5th Cir. 1976). The court recognized the general rule that a defendant's request for a mistrial removes any Constitutional barrier to retrial. (530 F. 2d at 1255). But the Fifth Circuit recognized and stated that the Supreme Court recognized that where the mistrial or reversal is "attributable to prosecutorial . . . overreaching" citing Jorn, supra, the Double Jeopardy barrier to retrial, is not removed. The court also succinctly summarized the policy consideration which underlies the exception to the rule permitting retrial where the government has misbehaved, stating, "where 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction". (530 F. 2d 1255-6). The court also noted that the fact that a defendant requested a mistrial is not controlling nor would that fact be controlling as to whether or not there had been a conviction in the first trial. The court quoted the Assistant Attorney General of the Criminal Division of the Department of Justice that "retrial of a defendant is not constitutionally prohibited following the termination by mistrial or appellate reversal of a criminal conviction as long as the ruling . . . was not necessitated by prosecutive misconduct." See 530 F. 2d 1255-6, Footnote 12.

The Supreme Court has consistently rejected "rigid, mechanical rule[s]" in this area. Illinois v. Sommerville, 410 U.S. 458, 467 (1973). The Supreme Court has also stated "we resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion'". Downum v. United States, 372 U.S. at 738 (1963).*

The Fifth Circuit in the United States v. Kessler, 530 F. 2d 1246 at 1255-6, sets forth the principles which should guide the court in the resolution of this issue. There the court stated:

> "Where 'prosecutorial overreaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. This safeguard against 'prosecutorial overreaching' provided defendants by the Fifth Amendment's Double Jeopardy Clause complements the 'inestimable safeguard against the * * * overzealous prosecutor' provided by a jury trial.

---

* The fact that the defendant Burse was convicted on Count 1 in the first trial, which was later reversed for prosecutorial misconduct, does not mean that he is not being twice put in jeopardy for, as stated in Ball v. United States, 163 U.S. at 669, "the prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial". [Emphasis supplied]

> "Thus, a stringent analysis of the prosecutor's conduct, considering the totality of the circumstances prior to the mistrial, to determine if there was 'prosecutorial overreaching' is our inquiry. If 'prosecutorial overreaching' is found, a second trial is barred by the Double Jeopardy Clause notwithstanding the fact that the defendants requested the mistrial.
>
> "To find 'prosecutorial overreaching' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.'"

In this case, this Court has already determined that the closing argument of the government constituted prosecutorial misconduct which can be equated with prosecutorial overreaching as stated in United States v. Jorn or prosecutorial misbehavior as the phrase is encompassed in the letter of the Assistant Attorney General of the Criminal Division. This, taken together with the often quoted standards as set forth in the United States Supreme Court cases interpreting the Double Jeopardy Clause that such Clause is to be interpreted liberally in favor of the individual require dismissal of the conspiracy count.

Additionally, the defendant objected at every turn to his retrial on the conspiracy count and raised the issue as

mentioned above after the jury was sworn, It is the further contention of the defendant that the admission into evidence of the testimony of certain witnesses, namely Barbara Ramos (395-427) and the testimony of DeBose that the defendant Burse had actually participated in the substantive crimes on which he had previously been acquitted, constituted error. This evidence was allowed apparently under the theory that the substantive crimes were raised as overt acts in the conspiracy count of the indictment, but the fact of the matter is that the defendant, by a previous jury verdict had been acquitted of these crimes. The Government was allowed to present testimony concerning the defendant's alleged participation in substantive bank robbery offenses of which he had been acquitted in violation of the collateral estoppel rule as set forth in Ashe v. Swenson, 397 U.S. 436 (1970).

For all the above reasons, the conspiracy conviction should be dismissed because the guilty verdict was a result of prosecutorial overreaching after jeopardy had attached under the terms of the Fifth Amendment as stated in United States v. Jorn, 400 U.S. at 485 (1971) and United States v. Kessler, 530 F. 2d 1246 (5th Cir. 1976). Additionally, the conviction should be reversed since evidence used to secure it was evidence of the

defendant's alleged participation in substantive crimes of bank robbery on which he had been previously acquitted, in violation of the constitutional mandate.

POINT II

THE TESTIMONY OF ANNA DeBOSE WAS THE RESULT OF AN IMPERMISSIVELY SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION PROCEDURE AS A MATTER OF LAW AND SINCE THERE WAS NO INDEPENDENT BASIS FOR INDENTIFICATION, SUCH TESTIMONY SHOULD HAVE BEEN EXCLUDED AS PART OF THE PROSECUTION'S CASE.

Anna DeBose, the mother of Darrell DeBose, was called to testify. She testified that on a Tuesday morning in the summer of 1974, two individuals came to her house and asked for her son Darrell. She testified that she remembered it was a Tuesday because Tuesday is wash day (104). She testified that the individuals were Gary Green and Maurice Burse (105), but that she had never seen the person whom she had identified as Maurice Burse before (106) and that it was her son who told that his name was Maurice Burse after this incident (113,114). She testified that her son and the two individuals left together (107). She admitted that she had previously testified that she did not remember the date (111) and she testified that she did not know the person who was identified to her by her son as Maurice (113). She further testified that she had previously on occasion, referred to the person as Marie (113).

A few days after these events transpired, Mrs. DeBose testified that she was interviewed by two agents of the F.B.I. dressed in plain clothes (114, 115). They identified themselves as F.B.I. agents and showed her identification which consisted of an official looking that said Federal Bureau of Investigation (115). She remembered one of the names as being Mr. Davis (116) and testified that it could have been Davidson (116). She stated that the agent showed her three or four pictures (117). The first picture they showed her was a picture taken from the bank surveillance camera of her son Darrell in the process of robbing the bank (Gov't. Exhibit 7) which she identified as being her son Darrell (118). It was her testimony that they then showed her two more pictures (118) which she looked at carefully, and they asked whether she could identify the people on the pictures and she told them "I didn't know the boys" (118). She testified that she could not remember what one of the F.B.I. agents had then said to her (119), but that her recollection was better, 15 months ago when she previously had testified at the first trial (119). She testified that she would rely on what she had testified to at the first trial. She admitted that she had previously testified that the F.B.I. agents told her the names of the other two boys (120) and that she had testified

that it was Gary and Maurice because of what the F.B.I. agents had told her (121). She testified that there is absolutely no question in her mind that she was shown three pictures (122) and that if she had ever seen Maurice before those people came to her house, she did not recognize him (122).

Special Agent Davidson, who had filed a 302 report as a result of this interview, indicating that he and Special Agent Columbell had interviewed Anna DeBose on August 7, 1974, testified that he had only shown Anna DeBose the bank surveillance photograph (126). He admitted that he had shown a bank employee Eugene Jurkowitz, a large number of photographs including photographs of the defendant Burse and Gary Green (130), thereby admitting he had in his possession the two photographs. Although Special Agent Davidson would not admit that it was possible that he could be mistaken (132), he admitted the fact of the interview (133), the fact that he had identified himself during the interview (134), the fact that there were two F.B.I. agents (134) and the fact when showing another photograph display to a customer or person in or near the bank in connection with this bank robbery, he had failed to indicate in the 302 report the pictures which were shown her (135) and that this did not square with the practice of the F.B.I. (136) and constituted a mistake made by him during

this investigation (136). He further admitted that he interviewed Albert DeBose, the father of Darrell DeBose and filed a 302 report in connection with that interview (136) which indicated that Albert DeBose was home at the time the two individuals were alleged to have come to pick up his son Darrell (137) and that the 302 report which was filed by Mr. Davidson was mistaken in that it indicated that he was home when in fact, he was not home (138). Albert DeBose testified that he was not home when the two boys came and had never told the F.B.I. agents that he was (189-198). There was further testimony indicating other mistakes that Special Agent Davidson had made during the course of the bank robbery investigation including the fact that he had confronted the bank robber Darrell DeBose in the apartment of Evon Wright within one hour after the bank robbery occurred and had failed to make an arrest (235).

Thus, the credible testimony of Anna DeBose who had no particular axe to grind with respect to this trial, was that her identification of the defendant Burse was the result of an impermissively suggestive identification procedure. Indeed, in the first appeal of this case, this Court found that procedure to be impermissively suggestive, but did not exclude the testimony

on the grounds that there was an independent basis for her identification testimony. United States v. Burse, 531 F. 2d at 1155 (2d Cir. 1976).

Just as the defendants sought to raise the photographic identification procedure and the suppression issue in the former appeal, the defendant made a motion after remand for suppression of Mrs. DeBose's testimony which was denied by the District Court "on the present state of the record" in its memorandum opinion of November 15, 1976 (Appendix F). The issue was also raised on motion during the trial at which time the trial court stated "I agree with you in general that if you believe Mrs. DeBose's testimony, it seems to me that the suggestion that this was Maurice Burse certainly would be impermissible." and further "If the jury believes that that is what happened then they should not consider Mrs. DeBose's testimony at all." (463). Instead of ruling on the question, the judge submitted the issue to the jury as a factual question under instructions proposed by defendant's counsel (See charge of the court 624-628, Appendix G).

It is submitted that the defendant was entitled to a ruling by the trial court as to the impermissively suggestive

procedure and a ruling that as a matter of law, the testimony should have been excluded. Suppression motions are not to be decided by juries. It was only after the judge denied our motion to exclude the testimony as a matter of law (464) that the defendant proposed the instructions to the jury regarding the question. Furthermore, there is nothing contained in the record in this case, or indeed the record considering the previous trial, that indicates a sufficient independent basis by clear convincing evidence to allow the testimony of Mrs. DeBose and to allow it, was error which prejudiced the defendant. See Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); United States ex rel Cannon v. Montanye, 486 F. 2d 263 (2d Cir. 1973); United States v. Yanishefsky, 500 F. 2d 1327 (2d Cir. 1974) and United States v. Boston, 508 F. 2d 1171 (2d Cir. 1974).

POINT III

THE COURT'S SUPPLEMENTAL INSTRUCTION TO THE JURY THAT THE MINORITY SHOULD RECONSIDER THEIR POSITION, PREJUDICED THE DEFENDANT.

As previously outlined and as reflected in the entire record of this trial, this case was a close one. The prosecution's proof of conspiracy, rested in the main on a thoroughly discredited individual and the objective facts and testimony, or lack of it, of other witnesses as to what they saw and observed, contradicted his recent rendition of the facts.

On December 27, 1976, the case resumed with rulings by the court on the parties' requests to charge in the absence of the jury. Thereafter, at approximately 10:20 A.M. (498) the summations began and immediately after their conclusion, the court charged the jury (592-639) which concluded at approximately 1:30 P.M. Thereafter, the jury initiated deliberations and went to lunch. At approximately 3:50 P.M., the jury sent the judge a note (640) and retired to resume its deliberations at approximately 4:00 P.M. (647). Between that time and 7:47 P.M. the jury went to dinner and requested testimony to be read at that time. After the reading of testimony, and at approximately 8:30

P.M. the jury resumed deliberations (650) and thereafter, at approximately 10:25 P.M. (650) the judge sua sponte called the jury to the courtroom. The jury had not reported any deadlock or disagreement at this time. Excluding the approximately 2 and 1/2 hours for lunch and dinner and the 1/2 hour when the jury was in the courtroom hearing testimony read to them, the jury had deliberated approximately five hours. The court then advised the jury of weather conditions which were admittedly threatening. He also advised the jury that Mr. Knisley, the court reporter, could drive home the two who lived near to him in the neighborhood south of the city*. The judge then, on his own, without consultation with counsel for either party, delivered a supplemental charge to the jury which included quotations from Allen v. United States, 164 U.S. 492 (1896), the often criticized case involving what has come to be known as the "dynamite" or "nitroglycerin" charge, which has engendered more appellate litigation in criminal cases than any other single legal issue.**

---

* Mr. Knisley had already read testimony to them and thus, the mingling of jurors with the court reporter prior to a verdict would be improper. It is clear from this that the judge fully expected a verdict from the jury prior to midnight or 12:30 A.M. (651-652).

** Research discloses with the benefit of Sheppard's Citations that the specific issue of the propriety of instructing the minority to reconsider their viewpoint and the general propriety of an Allen charge has been dealt with in more than 200 Federal Court opinions.

The judge instructed the minority to reconsider their viewpoint. He did not instruct the majority to reconsider theris. Specifically, the court told the jury:

> "Although the verdict must be the verdict of each individual juror they should listen with a disposition to be convinced of each other's argument that the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of some men equally honest, equally intelligent as himself. If upon the other hand the majority were for acquittal the minority ought to ask themselves whether they may not reasonably doubt the correctness of the judgment which was not concurred in by the majority." (653-654)

Counsel for the defendant promptly objected (654). Objection was made to the "quotation from the Supreme Court Reporter" and on the grounds that the jury had not been deliberating that long (654). Specific objection was made on the grounds it was a "modified Allen charge" (655). The court noted the objection and stated that he knew the point defendant was attempting to raise when Judge Curtin stated: "I know your point, you object to my giving the charge." to which counsel replied "Right." to which the court responded "and that objection is noted" (656). We not only objected to the charge which Judge

Curtin had given exhorting the minority to reexamine their position, but giving no similar instruction to the majority, but we objected to him giving any charge at all in view of the short time which the jury had deliberated and in view of the fact that the jury had not reported a deadlock (657).

Although Chief Judge Curtin, both before and after giving the objectionable portion of the Allen charge, told the jurors to come to a "conscientious judgment" (652, 654), we submit that this general language was overshadowed by his instructions to the minority only to reconsider their views and as such had the coercive effect of "turning the deliberation process into a sort of 'Gallop Poll' mechanism." United States v. DeStefano, 476 F. 2d 324 at 334 (7th Cir. 1973).*

It is not the intention of this brief to review the hundreds of cases involving the Allen charge or to quote at length the various scholarly treatises which have been critical of the instruction. See Note, Supplemental Jury Charges Urging A Verdict - The Answer Is Not Yet To Be Found, 56 Minn. L. Rev. 1199 (1792) Comment, The Allen Charge: Recurring Problems And Recent Developments, 47 N.Y.U.L. Rev. 296 (1972) Note, Due Process,

---

* The verdict was returned 67 minutes later (657-658) in time for a juror to make the last bus home (652).

Judicial Economy In The Hung Jury: A Reexamination Of The Allen Charge, 53 Val. Rev. 123 (1967), Note, On Instructing Deadlock Jury, 78 Yale L.J. 100 (1968), Note, Deadlock Juries And Dynamite: Critical Look At The "Allen Charge", 31 U. Chi. L. Rev. 386 (1964). Time and space limitations would not permit such a review and in light of the vast experience which this Court has had with the constantly recurring problem, see cases of this Court collected at Ralls v. Manson, 375 F. Supp. 1271 at 1294-1295 (D.C. Conn. 1974, Blumenfeld, J.), such an exercise would surely be "carrying coals to Newcastle".

Suffice it to say that this Court has previously expressed "grave doubts" about the Allen charge and allowed it to stand by only "the barest margin", see United States v. Kenner, 354 F. 2d 780, 782-784 (2d Cir. 1965).*

Since that time the American Bar Association has recommended that the Allen charge be replaced. See American Bar Association's Standards Relating To Trial By Jury, 145-146

---

* The trial judge in Kenner stated when defense counsel objected to an Allen charge, "I would give it to my mother." See Note on Instructing Deadlocked Juries, 78 Yale L. J. 100, Footnote 5 (1968).

(1968). Additionally, the various circuit courts have decidedly split on how to handle this question. United States v. Bailey, 468 F. 2d 652 at 667-668 (5th Cir. 1972) quoted at length at Ralls v. Manson, 375 F. Supp. 1271 at 1295-1296 (D.C. Conn. 1974).

It is submitted that in light of the fact that the jury had reported no deadlock, in this close case, the conviction should be reversed.

Moreover, we respectfully submit that the time has come for this Court to add its prestige and clout to the ever-growing body of legal opinion that holds that an instruction to a jury which tells the jurors that only the minority should reconsider their views should be prohibited, is intolerable and in the exercise of its supervisory capacity in this circuit, denies the defendant the benefit of the doubt that an individual juror might have, contravenes the presumption of innocence.

Allen v. United States, 164 U.S. 492 (1896) is and always has been a scarecrow in the law. Alexander Allen was a 14 year old balck charged with murder on the Cherokee Nation Reservation, more than 80 years ago. He was thrice tried and thrice convicted and on the first two occasions, the Supreme

Court of the United States reversed for various reasons. On the third review by the Supreme Court of the United States, the report indicates that Allen was unrepresented by counsel and furthermore, the Court in approving the instruction regarding minority jurors, stated:

> "We are somewhat embarrassed in the consideration of this case . . . by the absence of a brief on the part of the plaintiff in error."
> 164 U.S. at 494.

We suggest that the cause of this Appellate judicial embarrassment should end and that the many distinctions which Federal Circuit Courts have made in reviewing the propriety of like instructions, should be cleared away by a forthright holding that any supplemental instruction must exhort both majority and minority jurors to reconsider their views in an effort to reach a unanimous verdict. A defendant in a criminal case is entitled to each individual juror's conscientiously and sincerely held view, even though the juror may be a minority of one.

Finally, it seems to us anomalous that a sophisticated, and even-handed trial judge such as Chief Judge Curtin would, after some six hours of deliberation by a jury which had not reported a deadlock, reach for a dusty, dog-eared volume of

the Supreme Court Reports from 80 years ago and instruct the jury that the minority only, should reconsider its view, in contravention of his previously given instructions on reasonable doubt (593, 609-612, 613).*

It is incongruous that district courts in this circuit, when reviewing on a habeas corpus petition, the propriety of an Allen charge in a state court, would overturn the conviction and grant the writ, yet, this circuit continues to reach and stretch to find justification for the same type of charge when delivered by district courts in the circuit. See for example, Ralls v. Manson, 375 F. Supp. 1271 (D.C. Conn. 1974) and compare with cases cited at 375 F. Supp. 1294-1295.

We quote from the dissenting opinion of Circuit Judge Brown in Huffman v. United States, 297 F. 2d 754 at 759 (5th Cir. 1962):

> "The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great."

---

* The defendant makes no claim of error in any other portion of the trial court's charge during this trial.

For all the above reasons this Court, in the exercise of its supervisory power over district courts in the circuit, should condemn the Allen type supplemental instruction to minority jurors and on this ground alone, reverse the conviction and order a new trial.

CONCLUSION

For the reasons set forth in Point I above, the conviction should be reversed and the indictment dismissed; for the reasons set forth in Points II and III above, the conviction should be reversed and a new trial ordered.

Respectfully submitted,

R. WILLIAM STEPHENS
Attorney for Appellant
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF ERIE)

R. WILLIAM STEPHENS being duly sworn, deposes and says that he is over the age of 21 years and resides at 17 Cortland Avenue, Tonawanda, New York. That on the 5th day of April, 1977 he served two copies of the Brief of Appellant in United States of America v. Maurice Burse, by delivering two copies there of to the Office of the United States Attorney, Fifth Floor, United States Courthouse, Buffalo, New York 14202, personally.

R. William Stephens
R. WILLIAM STEPHENS

Sworn to before me this
5th day of April, 1977.

Mary Ann Battaglia
Notary Public

MARY ANN BATTAGLIA
Notary Public State of New York
Qualified in Erie County
My Commission Expires March 30, 19 78